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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-6519

NAHUM ZACKAI, Appellant,

v.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES FOR CHICAGO STATE UNIVERSITY, Appellee.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The appellant, Dr. Nahum Zackai, asks leave to file the attached Jurisdictional Statement without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The appellant's affidavit in support of this motion is attached hereto.

Gary H. Palm
Counsel for Appellant

Gary H. Palm
Edwin F. Mandel Legal Aid Clinic
6020 South University Avenue
Chicago, Illinois 60637
(312) 324-5181

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AFFIDAVIT

I, Nahum Zackai, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the appellant in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

The Illinois Supreme Court ruled that the Illinois Fair Employment Practices Commission lacks jurisdiction over my charge of employment discrimination because of its failure to issue a complaint within the statutory time period. The present proceeding was commenced as an appeal, as permitted by 28 U.S.C. §1257(2), on the ground that the decision violates the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

Nahum Zackai

Nahum Zackai

Subscribed and Sworn to
before me this 30th day
of April, 1980.

Sally Mendoza
Notary Public

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JURISDICTIONAL STATEMENT

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Dated: May 1, 1980

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JURISDICTIONAL STATEMENT

Dr. Nahum Zackai, the appellant, appeals from the issuance of a writ of prohibition by the Supreme Court of Illinois on November 21, 1979. The Petition for Rehearing was denied on February 1, 1980. This jurisdictional statement is submitted to show that jurisdiction lies for this appeal and that a substantial issue is raised. The issuance of the writ of prohibition violates appellant's Fourteenth Amendment rights to due process of law and the equal protection of the laws.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois, which appears in the appendix hereto, p.1a, is reported at 78 Ill.2d 143, 399 N.E.2d 590 (1979). The orders entered by Administrative Law Judge Patricia A. Patton are not reported. The order denying appellee's motion to dismiss dated January 31, 1979 is reproduced in the appendix,

p.1d, infra. The order denying appellee's motion for reconsideration dated March 13, 1979 is also reproduced in the appendix, p.1e, infra.

JURISDICTION

The judgment of the Supreme Court of Illinois, granting the original writ of prohibition and terminating appellant's pending action before the Illinois Fair Employment Practices Commission was entered on November 21, 1979. See p.1a, infra. A petition for rehearing was submitted by Dr. Zackai and denied on February 1, 1980.

The notice of appeal to this Court was duly filed in the Supreme Court of Illinois on May 1, 1980. This appeal is being docketed in this Court within 90 days from the denial of rehearing below.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

QUESTIONS PRESENTED

1. Does the termination of employment discrimination actions under the Illinois Fair Employment Practices Act solely because the Fair Employment Practices Commission failed to complete its investigation within 180 days violate equal protection because it is an irrational classification?

2. Does due process attach to employment discrimination actions filed under the Illinois Fair Employment Practices Act?

3. Is an individualized decision by the Fair Employment Practices Commission on the merits of each charge of employment discrimination required by due process and equal protection?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment, United States Constitution, §1:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ill. Rev. Stat. ch. 48, §§851, 852(d), 853(a), 856, 856.07, 858, 858.01(a), 860 (1975) are reproduced in the appendix hereto, pp.1-4f, infra.

Ill. Rev. Stat., ch. 48, §858.01a (added by Public Act 80-1455, Section 1, effective September 16, 1978) is reproduced in the appendix hereto, p.4f, infra.

STATEMENT OF THE CASE

On November 30, 1976, appellant, Dr. Nahum Zackai, filed a charge with the Illinois Fair Employment Practices Commission (hereinafter "Commission"), pursuant to Ill. Rev. Stat. ch. 48, §858 (1975), alleging that Chicago State University had discriminated against him because of a physical handicap, his blindness. Chicago State University is part of the Illinois Board of Governors (hereinafter "Board of Governors") system of state colleges and universities which is the appellee in the present action.

In May, 1976, Dr. Zackai suffered a hemorrhage behind his eyes, and lost most of his sight. He was informed by his physician that he was legally blind. At that time, appellant was a sixty-six year old male and had been employed as a tenured professor for fifteen years by Chicago State University. Unaware of the rehabilitative resources available to the visually

handicapped, Dr. Zackai felt compelled to resign and submitted a letter dated May 12, 1976 to Dr. Allan DeGiulio, Vice President for Academic Affairs at Chicago State University, requesting an early retirement effective June 30, 1976. Although receipt of the request was acknowledged by Dr. DeGiulio, no further action was taken.

During the following weeks, Dr. Zackai spoke with professionals who work with the visually handicapped and learned that with adjustments he would be able to continue his teaching career. Therefore, Dr. Zackai wrote a letter to Dr. DeGiulio on June 17, 1976, withdrawing his retirement request. As of June 17, 1976, Board of Governors had not acted upon Dr. Zackai's request for an early retirement; nevertheless, Dr. DeGiulio refused to withdraw the May 12 retirement request and instead informed Dr. Zackai that the request could not be withdrawn. Finally, on July 29, 1976, more than a month after Dr. Zackai sought to withdraw his request, the Board of Governors officially retired him. Dr. Zackai claimed that the Board of Governors discriminated against him since others were allowed to withdraw early retirement requests.

The Illinois Fair Employment Practices Act provides:

> Unfair employment practices.)
>
> It is an unfair employment practice:
>
> (a) For any employer, because of the race, color, religion, sex, national origin, ancestry or physical or mental handicap unrelated to ability of an individual, or an unfavorable discharge from military service, to refuse to hire, to segregate, or otherwise to discrimin-

> ate against such individual with respect to hire, selection and training for apprenticeship in any trade or craft, tenure, terms or conditions of employment.... Ill. Rev. Stat. ch. 48, §853(a) (1975).

The Commission is given the power to "issue, receive, investigate, and determine charges" of violations of the Fair Employment Practices Act. Ill. Rev. Stat. ch. 48, §856.07 (1975). The Fair Employment Practices Act requires that charges be filed within 180 days of the occurrence of an unfair employment practice. Ill. Rev. Stat. ch. 48, §858 (1975). By filing his charge on November 30, 1976, Dr. Zackai fulfilled this requirement.

After a charge has been filed with the Commission, the Fair Employment Practices Act requires that it conduct its own investigation into the facts surrounding the charge. Ill. Rev. Stat. ch. 48, §858 (1975). If the Commission concludes after its investigation that there is a lack of "substantial evidence" to support the charge, then it is directed to dismiss the charge. Id. If it is determined that substantial evidence exists to support the charge, then the Commission is directed to attempt conciliation between the parties to the charge in an effort to reach settlement. Id. If conciliation is unsuccessful, then the Commission issues a complaint and a public hearing is scheduled. Ill. Rev. Stat. ch. 48, §858.01(a) (1975). The Fair Employment Practices Act states that:

> Whenever such a charge of an unfair employment practice has been properly filed, the Commission, within 180 days thereof or within any extension of that 180 day period agreed to in writing by all parties and approved by a member of the Commission, shall either issue and serve a complaint in the manner and form set forth in this Section or shall order that no complaint

be issued. Any such order shall be duly served upon both the complainant and the respondent. Ill. Rev. Stat. ch. 48, §858.01(a) (1975).

On November 30, 1976, at the time Dr. Zackai's charge was filed, the Commission had a backlog of approximately two thousand cases. The Commission did not begin its statutorily required investigation (Ill. Rev. Stat. ch. 48, §858 (1975)) until February, 1977. On May 30, 1977, the 180 day period in which the Commission is directed to investigate, conciliate, and either dismiss the charge or file a complaint pursuant to Ill. Rev. Stat. ch. 48, §858.01(a) (1975) elapsed.

On April 4, 1978, the Commission notified both the Board of Governors and Dr. Zackai of its findings that there was substantial evidence of discrimination. Attempts at conciliation were unsuccessful, and a complaint was issued on June 22, 1978.

On June 27, 1978, the Board of Governors filed a motion to dismiss the complaint.

In its motion, the Board of Governors contended that the Commission lacked subject matter jurisdiction over Dr. Zackai's claim because it had not issued the complaint within 180 days after he had filed his charge. Relying on Springfield-Sangamon County Regional Plan Commission v. Fair Employment Practices Commission, 71 Ill.2d 61, 373 N.E.2d 1307 (1978), the Board of Governors argued that the 180 day time period contained in §858.01 (a) was mandatory, depriving the Commission of jurisdiction over any complaint issued later. In responding to the Motion to Dismiss, appellant distinguished Springfield-Sangamon, supra, on the ground that in that

case, the respondents to the charge had not been named or joined as parties until long after the charge had been filed and, thus, had suffered prejudice as a consequence of the delay in filing a charge. Appellant relied on Moss-American, Inc. v. Fair Employment Practices Commission, 22 Ill.App.3d 248, 317 N.E.2d 343 (1974), which the court found to be inapposite to the facts of Springfield-Sangamon, supra. In Moss-American, an Illinois Appellate Court declined to dismiss a complaint since no prejudice was shown.

On April 6, 1979, the Board of Governors filed a motion for leave to file a petition for an original writ of prohibition with the Illinois Supreme Court, which was granted on April 16, 1979. Thereafter, both the Commission and Dr. Zackai filed motions to dismiss the petition, which the Illinois Supreme Court ordered to be taken with the case. In support of its petition, the Board of Governors relied on Springfield-Sangamon, supra, and argued that the 180 day provision was mandatory and that the Commission lacked subject matter jurisdiction over complaints issued after the expiration of the 180 day period. Dr. Zackai relied on Moss-American, supra, which had been distinguished by the Illinois Supreme Court in Springfield-Sangamon, supra, to support his position that the Commission had not lost jurisdiction over his complaint and the provision should be construed as directory in nature.

In its November 21, 1979 decision, the Illinois Supreme Court rejected Dr. Zackai's statutory argument. The court held that the Fair Employment Practices Act's

provision for the issuance of a complaint within 180 days after the filing of a charge was mandatory and that any complaint issued after the expiration of that time period was unauthorized. Dr. Zackai filed a timely petition for rehearing which challenged the constitutionality of the court's construction under the Fourteenth Amendment. The Illinois Supreme Court denied the rehearing petition on February 1, 1980.

THE QUESTIONS ARE SUBSTANTIAL

I. INTRODUCTION.

This case presents an important question about the constitutional limits on judicial and administrative efforts to resolve caseload backlogs. Severe backlogs have developed in courts and administrative agencies because of inadequate resources to meet the explosion of litigation which occurred in the 1960's and 1970's. As this Court is aware, great concern has focused on this problem in the administration of justice. New approaches have been tried to improve the speed and efficiency in the disposition of cases. Many courts and agencies have established administrative units to monitor caseloads, often using the most modern computer technology available. New procedural tools have been developed for the early screening of cases to identify those with little likelihood of success and those which may be amenable to settlement. This case demonstrates how over-zealous solutions can violate the equal protection and due process rights of parties to have their cases heard and decided rather than simply being disposed of without regard to the merits.

The Illinois legislature provided that the Fair Employment Practices Commission should investigate every charge of an unfair employment practice to determine which are supported by sufficient evidence to proceed to a hearing. The Illinois Fair Employment Practices Act requires that the Commission "shall either issue and serve a complaint ... or shall order that no complaint be issued" within 180 days from the filing of the charge. Ill. Rev. Stat. ch. 48, §858.01 (1975). Here the Commission failed to do either. The Illinois Supreme

Court ruled that the Commission's failure to decide this case within the 180 day period results in the Commission losing jurisdiction and the termination of Dr. Zackai's case. Over 2000 complainants are in the same position as Dr. Zackai. Unless this Court reverses the Illinois Supreme Court, the rights of these individuals and future complainants as well are jeopardized.

Although the Illinois legislature and the Illinois Supreme Court were seeking to meet the salutary goal of solving the backlog problem in the Commission's processing of employment discrimination charges, the method they choose was arbitrary. This Court should grant plenary review of this case to establish the constitutional limits on administrative efforts to cure backlogs of litigation. This Court should explicitly decide what many of its prior decisions have assumed or implied, that due process requires that parties in litigation are entitled at a minimum to decisions from the governmental adjudicator. This Court should determine whether persons who complained of discrimination in employment should lose solely because the Commission did not meet its statutory duty to complete investigations within 180 days or rather whether they should have their cases considered on the merits. This Court must announce that the obligation of the adjudicatory structure in our country is to decide cases and not simply to process them. If plenary review is granted, appellant is confident that this Court will rule that due process and equal protection preclude the loss of rights resulting solely from the failure of the administrative and judicial processes to decide cases through no fault or other cause attributable to the losing party.

II. SUPREME COURT REVIEW OF THIS CASE IS IMPORTANT BECAUSE THE TERMINATION OF CLAIMS SOLELY BECAUSE THE ILLINOIS FAIR EMPLOYMENT PRACTICES COMMISSION FAILED TO RULE WITHIN 180 DAYS IS IRRATIONAL AND VIOLATES EQUAL PROTECTION.

This Court should determine whether the termination of rights by reason of the Commission's failure to complete its investigation within 180 days is irrational and violates equal protection. This Court has consistently recognized that statutory classifications must meet the minimum test of rationality in order to comply with the requirements of equal protection. In Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911), Justice Van Devanter announced a lenient test:

> One who assails the classification in ... a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.220 U.S. at 78-79.

Later, in F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920), this Court announced a more stringent standard:

> [T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.253 U.S. at 415.

In the 1960s, the more lenient test of legislative enactments was reformulated by Chief Justice Warren when, in McGowan v. Maryland, 366 U.S. 420 (1961), he wrote for a unanimous Court:

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power

> despite the fact that in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.366 U.S. at 425-26.

In the 1970s, this Court has employed several different approaches to analyze legislative classifications. Some have used an approach that prohibits certain conclusive or irrebuttable presumptions. Jimenez v. Weinberger, 417 U.S. 628 (1974); United States Department of Agriculture v. Murry, 413 U.S. 50 (1973). In Weinberger v. Salfi, 422 U.S. 749 (1975), Mr. Justice Rehnquist rejected the conclusive presumption approach and returned to the lenient rational scrutiny method. The most recent equal protection decisions of this Court have examined legislative classifications by considering whether there is a rational basis for the classification in light of the legislative purposes to be served. Under this approach, the Court will not overturn a statutory classification

> unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational. Vance v. Bradley, 440 U.S. 93, 97 (1979).

Under any of the modes of analysis discussed above, the classification used by the Illinois legislature fails to pass minimum scrutiny. An explanation of the statutory scheme for the litigation of claims before the Commission will demonstrate that the Illinois Supreme Court's interpretation of the 180-day requirement has no rational basis. The legislature established a screening procedure to sift out the meritorious claims from the

non-meritorious. It provides for a preliminary review of the charge by Commission staff. The Commission is required to decide whether the charge meets the threshold requirement of "substantial evidence" that an unfair employment practice occurred. If the Commission finds no substantial evidence, the charge is dismissed. If the Commission finds substantial evidence, it is to attempt conciliation. Ill. Rev. Stat., ch. 48, §858 (1975). If a settlement is not reached, the Commission is to issue a complaint and order that the case proceed to a public hearing. The complainant is then permitted to prosecute his case before an administrative law judge. The Commission has 180 days after a charge has been filed to either issue a complaint or dismiss the charge. §858.01(a).

After the Commission issues its complaint, the complainant takes over prosecution of his complaint. He then controls its progress through motions, discovery, pre-hearing procedures and the presentation of evidence and argument at the public hearing. §858.01(b). Each party may file briefs supporting or opposing the administrative law judge's recommended order and decision. Oral argument is permitted before the full Commission. §858.02(b). The parties may seek administrative review in the Circuit Court and further appellate review before the Illinois Appellate Court and before the Illinois Supreme Court in its discretion. The only time the progress of the proceedings is out of the control of the parties is during the investigation by the Commission.

Appellant only contests the Illinois Supreme Court's ruling that the failure of the Commission to act

within the 180 day period causes dismissal of the case. Appellant does not contest the procedures for screening cases in general. The failure of the Commission to decide within 180 days is not a rational way of choosing which of the cases should be allowed to proceed. It results in worse treatment for complainants than if their charges were dismissed for lack of substantial evidence within 180 days. It penalizes complainants when they had no control over meeting the deadline. It operates without regard to the relative merits of the cases. Finally, the classification is not rationally related to the basic purposes of the Fair Employment Practices Act.

The Illinois Supreme Court's decision is irrational because it results in worse treatment to the complainant than if the Commission had found no substantial evidence and dismissed the charge. The litigation is terminated because of the issuance of the writ of prohibition. Had the Commission dismissed the charge within 180 days, at least the appellant would have retained his right under the Administrative Review Act for judicial review of the dismissal in the Circuit Court. §860. If the Circuit Court had reversed the dismissal, it would remand to the Commission for issuance of the complaint and adjudication through a public hearing. However, the Illinois Supreme Court's writ of prohibition forbids any further proceedings including a decision by the Commission susceptible of judicial review. Under the Illinois Supreme Court's decision, a dismissal due to the Commission's failure to act within 180 days is not reviewable by any court for any reason.

The complainants are irrationally penalized by having their charges dismissed even though they had no responsibility for the Commission's failure to issue a complaint within 180 days. The classification is not like a statute of limitations which prescribes time limits on the initiation of an action by an individual. Ordinarily the individual controls the initiation of the proceedings and is fairly held accountable for meeting the statutory deadlines. Indeed, in this case, Dr. Zackai filed his charge within the time provided by the Fair Employment Practices Act. Typical statutes of limitations are not irrational because they serve to protect the adverse party from the prejudice of being surprised by stale claims. Weinberger v. Salfi, 422 U.S. 749 (1975). Here, the Board of Governors was informed of the claim by the timely filing of the charge.

Nor has any claim been advanced that Dr. Zackai was responsible in any way for the Commission's inaction. Dr. Zackai did not delay the proceedings. No procedures were available for Dr. Zackai to speed up the investigation or bring it to a decision. The 180 day time limit is not a waiting period like that provided in the federal Title VII action for the Equal Employment Opportunity Commission's investigation. He did not retain a private action to pursue on his own.[1/] Rather his claim was left

---

1/ The legislature enacted a statute to try to revive the actions terminated by the Illinois Supreme Court's decisions. The law provides that individuals whose charges were filed with the Commission before March 30, 1978 and where a complaint was not issued within 180 days could file an action in circuit court to pursue their claims of employment discrimination. Ill. Rev. Stat. ch. 48, §858.01a (added by Public Act 80-1455,

(footnote continued on next page)

in the hands of the Commission staff. When 180 days expired, whether because of bureaucratic delays, neglect, malice, or indecision, he lost.

Such a conclusive presumption to clear up caseload backlogs is irrational and must be condemned as a violation of equal protection. In other contexts, this Court has stated that "legal burdens should bear some relationship to individual responsibility or wrongdoing." Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972). In this case, equal protection demands an individualized determination on the merits of the charge.

The 180 day classification fares no better as a measure of the relative merits of the backlogged cases. First, the Commission staff failed to complete investigations within 180 days in almost all cases. Statistics have not been kept which show the percentage of cases in which the investigation was not completed within 180 days. However, the affidavit of James E. Braxton shows that as of January 1, 1978 2901 (or 81%) of the 3572 charges had been pending over 180 days for investigation before the Commission. Appendix, p.2c, Table II. Second, this case shows that the classification fails because ultimately the Commission found that there was

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(footnote continued from preceding page)

Section 1, effective September 16, 1978). Only a few cases have been filed in the circuit court and none have reached judgment. Since it creates a remedy retroactively, there are substantial questions concerning its validity under Illinois law and the United States Constitution. In its opinion in this case, the Illinois Supreme Court, although given the opportunity, did not give any indication of its views about the validity of the statute. Dr. Zackai is put in a most difficult position. If the Illinois Supreme Court's decision stands unreversed, he will be remitted to a circuit court action that may prove to be illusory. It too may be held to be a useless enterprise by the Illinois Supreme Court.

substantial evidence to support Dr. Zackai's charge. Nevertheless, he lost because the Commission violated its duty.

Appellant submits that equal protection requires an individualized decision on the merits. With all due respect, appellant analogizes the Commission's screening process to this Court's review of Jurisdictional Statements and Petitions for Certiorari. The exercise of discretion by this Court is necessary to select those cases which raise issues deserving of review. Likewise, the Commission chooses which cases shall proceed to a hearing. The constitutional violation occurred here because Dr. Zackai's charge was dismissed solely because of the Commission's failure to exercise its discretion. This Court would not deny review because its workload was so great that it precluded considering whether its discretionary standards were met. It might be that those standards are raised and lowered as workload pressures fluctuate. However, this Court would never allow cases to be rejected solely because the Justices or their clerks could not find time to consider them. None of the Justices of this Court would countenance a denial of review without first considering the merits of the request. To do so would not be rational. Deserving cases would be rejected and less deserving ones would be accepted. When decisions are made only by the use of irrational criteria, those who lose have not received equal treatment. This Court would not allow such unequal treatment in its discretionary decisions and should decide that it is not allowed with respect to charges

before the Illinois Fair Employment Practices Commission either.

Further, the dismissal of charges solely because of the failure of the Commission to comply with the 180 day provision is not rationally related to the primary purposes of the Illinois Fair Employment Practices Act. Section 851 sets forth the policy:

> [I]t is declared to be the public policy of this State that without in any way precluding any employer from selecting between persons of equal merit, ability, and capabilities, equal employment opportunity or apprenticeship opportunity without discrimination because of race, color, religion, sex, national origin, ancestry or unfavorable discharge from military service or physical or mental handicap unrelated to ability should be protected by State law.
>
> It is also the public policy of this State to protect employers, labor organizations and employment agencies from unfounded charges of discrimination. Ill. Rev. Stat. ch. 48, §851(1) (1975).

As has been demonstrated above, the Illinois Supreme Court's decision does not protect equal employment opportunity from discrimination since meritorious charges are dismissed.

While this Court has never directly addressed the limits on efforts to eliminate backlogs, it has rejected the justification of speed and efficiency to the exclusion of considerations of merit. In Stanley v. Illinois, 405 U.S. 645 (1972), equal protection rights were held to be violated when fathers of illegitimate children were conclusively denied custody. This Court recognized the efficiency of the presumption but ruled efficiency was not sufficient.

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency.... Indeed, one might fairly say of the Bill of Rights in general,. and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. 405 U.S. at 656.

III. A SUBSTANTIAL AND IMPORTANT QUESTION IS PRESENTED WHETHER DUE PROCESS REQUIRES, AT A MINIMUM, A DECISION ON THE MERITS OF EACH CASE BY THE ILLINOIS FAIR EMPLOYMENT PRACTICES COMMISSION.

This Court should grant plenary review to determine whether due process precludes the government from resolving disputes between private parties by its failure to make a decision on the merits. By enacting the Fair Employment Practices Act, the Illinois legislature sought to remedy one of the major social ills of Illinois and this nation: discrimination in the terms and conditions of employment based on race, sex, religion, national origin, or physical or mental handicap. The Fair Employment Practices Act creates substantive rights or interests in protected individuals to be free from employment discrimination based on impermissible factors and entitles them to receive equitable relief, including back pay lost as a result of past acts of discrimination. This Court should decide that an individual is protected from being arbitrarily deprived of these types of interests by the procedural guarantees of the Fourteenth Amendment of the United States Constitution.

In the past civil litigants have been afforded due process protection. Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950). See also Wolff v. McDonnell,

418 U.S. 539 (1974) (protection given prisoners' rights to litigate civil rights actions as well as habeas corpus petitions). As this Court has stated:

> It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law ... and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status. Paul v. Davis, 424 U.S. 693, 710-11 (1976).

The process which is due when the state deprives an individual of an interest it created should be governed by the Constitution and not, necessarily, by procedures authorized by the legislature. Arnett v. Kennedy, 416 U.S. 134 (1974) (views of six justices). Although it has never been directly decided, this Court should now decide the substantial question whether state action, such as that authorized by the Illinois Supreme Court, comports with the minimum requirements of due process.

The decision by the Illinois Supreme Court legitimizes the deprivation of an individual's rights through state inaction. The ruling resulted in the termination of Dr. Zackai's rights under the Fair Employment Practices Act because of the Commission's failure to complete its investigation and reach a decision on the merits of his charge within 180 days. Dr. Zackai was never notified of the impending termination of his rights nor given a meaningful hearing on the merits of his charge. The decision approved arbitrary and unilateral state action as a means of terminating Dr. Zackai's rights.

Due Process requires "an opportunity ... granted at a meaningful time and in a meaningful manner," Armstrong v. Manzo, 380 U.S. 545, 552 (1965), "for a hearing appropriate to the nature of the case," Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950). Under this Court's prior decisions, the form of the required hearing has depended upon the context. In Bell v. Burson, 402 U.S. 535 (1971), this Court struck down a Georgia statute which provided for the suspension of the driver's license of an uninsured motorist who was involved in an accident unless security was posted equal to the amount of damages claimed. No administrative hearing at which fault and liability could be decided was conducted prior to the suspension. In arriving at its decision, this Court recognized that the underlying purposes of this statute related to the ultimate adjudication of private tort suits seeking damages:

> Since the only purpose of the provisions before us is to obtain security from which to pay any judgments against the licensee resulting from the accident, we hold that procedural due process will be satisfied by an inquiry limited to the determination whether there is a reasonable possibility of judgments in the amounts claimed being rendered against the licensee. 402 U.S. at 540.

Thus, this Court held that due process required a preliminary determination of the question of liability. In Mullane, supra, due process was held to require that the beneficiaries of a common trust receive prior notice and a hearing before a judicial settlement of accounts by the trustee. A decision which did not provide for the meaningful consideration of the interests of the beneficiaries might "cut off their rights to have the trustee

answer for negligent or illegal impairments of their interests." 306 U.S. at 313.[2/] In both Fuentes v. Shevin, 407 U.S. 67 (1972) and Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), a decision on the merits was required before a private party could avail himself of state procedures for altering property rights of other private parties. The common theme running throughout these cases is that due process requires at least a preliminary decision on the merits before state action can be employed in adjusting the rights of one private party vis-a-vis the other.

Although the form of the hearings approved in the above cases varies considerably, the common denominator in all was a hearing with a decision based on the merits or at least an evaluation of the chance for success on the merits. Appellant agrees that the legislature can provide for the screening of cases by the Commission and that the procedures provided in the Fair Employment Practices Act are constitutionally sufficient if they result in a preliminary decision on the merits. The use of the "substantial evidence" test for the evaluation of the worth of a case is appropriate if the Commission actually uses the test to choose which cases can continue. However, appellant submits that the arbitrary dismissal of

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2/ Justice Stevens has stated, discussing Mullane, supra:

> Whenever one private party seeks relief against another, it is fundamental that some attention to the merits of the request must precede the granting of relief. New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96, 125 (1978) (J. Stevens, dissenting).

his charge merely because the Commission failed to render a timely decision violates the principles of due process.

Analogous to the present situation are temporary suspensions of licenses pending final adjudication of the grounds for termination. As discussed above, Bell v. Burson, supra, held that due process was violated because a drivers license was suspended without a preliminary adjudication of liability or fault. Quite recently, the Court has spoken again on the same general issue. In Barry v. Barchi, ___ U.S. ___, 99 S.Ct. 2642 (1979), the Court held that procedures for the temporary suspension of a racehorse trainer after one of his horses had been drugged were adequate. Because the state adduced evidence demonstrating probable cause that the trainer was at least negligent with respect to the drugging, a temporary suspension was permissible pending a prompt and effective adversary hearing. In light of these cases, Dr. Zackai was constitutionally entitled to a decision before his case was dismissed.

This Court has never decided whether state agencies such as the Commission which process employment related claims of public employees must meet the requirements of due process. It is well established that tenured public teachers have a constitutionally protected property interest in continued employment. Perry v. Sindermann, 408 U.S. 593 (1972). See also Board of Regents v. Roth, 408 U.S. 564, 576-77 (1972); Slochower v. Board of Education, 350 U.S. 551 (1956). A state created property interest may not be terminated in the absence of due process of law. See Perry v. Sindermann, 408 U.S. 593

(1972); Board of Regents v. Roth, 408 U.S. 564 (1972). At a minimum, due process requires notice, a hearing and a decision prior to the deprivation. See Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950).3/

The Fair Employment Practices Act is one of the methods provided by the state for its employees to challenge the termination of their employment. The term "employer" is defined to include the State of Illinois and its related governmental units, as well as private employers employing fifty or more persons. Ill. Rev. Stat. ch. 48, §852(d) (1975). Dr. Zackai's unfair employment practice charge alleged that his former employer, the Board of Governors, had discriminated against him because of his physical handicap. Appellant had been employed as a tenured professor by Chicago State University, a part of the Board of Governors system. Because of his tenured status and the fact that Board of Governors is a state entity, Dr. Zackai had a constitutionally protected interest in his continued employment. Thus, he was entitled to notice, a hearing

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3/ Another basis for a due process entitlement may be the interests in employment generally. In Truax v. Raich, 239 U.S. 33, 41 (1915), the Court declared that "...the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." More recently, in Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), a Civil Service Commission rule barring all non-citizens from federal employment was held unconstitutional. Justice Stevens observed for the Court that "ineligibility for employment in a major sector of the economy" was a loss "of sufficient significance to be characterized as a deprivation of an interest in liberty." Id. at 102. See also Examining Board of Engineers v. Flores de Otero, 426 U.S. 572 (1976) (statutory restriction on the ability of aliens to engage in the otherwise lawful private practice of civil engineering is plainly unconstitutional as violation of equal protection and due process clauses).

and a decision on the question of whether his right to continued employment had been violated. However, Dr. Zackai received no meaningful hearing because a decision on the merits was never made. Rather, he was deprived of his rights through unilateral and arbitrary state action.

CONCLUSION

For these reasons, the appellant respectfully prays that this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

Gary H. Palm
Counsel for Appellant

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(312) 324-5181

Glenn M. Engelmann and Linda E. Fisher, Senior Law Students at the University of Chicago Law School, assisted in the preparation of this jurisdictional statement.

Docket Nos. 51863, 51947 cons.—Agenda 38—
September 1979.

THE BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES FOR CHICAGO STATE UNIVERSITY, Appellant, v. THE ILLINOIS FAIR EMPLOYMENT PRACTICES COMMISSION *et al.*, Appellees.—ROYAL CROWN BOTTLING COMPANY OF CHICAGO, Appellant, v. THE ILLINOIS FAIR EMPLOYMENT PRACTICES COMMISSION *et al.*, Appellees.

MR. CHIEF JUSTICE GOLDENHERSH delivered the opinion of the court:

These consolidated cases present the question, first considered by this court in *Springfield-Sangamon County Regional Plan Com. v. Fair Employment Practices Com.* (1978), 71 Ill. 2d 61, whether the Fair Employment Practices Commission (FEPC) is empowered to issue a complaint against an employer more than 180 days after the filing of an unfair employment practices charge.

Section 8.01(a) of the Fair Employment Practices Act (Ill. Rev. Stat. 1977, ch. 48, par. 858.01(a)), prior to its amendment (see Pub. Act 80—1452, effective Sept. 16, 1978; Pub. Act 80—1455, effective Sept. 16, 1978), provided in part:

> "Whenever such a charge of an unfair employment practice has been properly filed, the Commission, within 180 days thereof or within any extension of that 180 day period agreed to in writing by all parties and approved by a member of the Commission, shall either issue and serve a complaint in the manner and form set forth in this Section or shall order that no complaint be issued. ***"

In cause No. 51863, a charge of unfair employment practice was filed with the FEPC on November 30, 1976, alleging that petitioner, the Board of Governors of State Colleges and Universities for Chicago State University, wrongfully refused to permit respondent Nahum Zackai to rescind a letter of resignation. On June 22, 1978, more than a year after the expiration of the 180-day statutory period, the FEPC issued a complaint against petitioner seeking reinstatement and back wages. Petitioner moved to dismiss the complaint, asserting that it was barred by section 8.01(a) of the Act. The hearing officer for the FEPC denied the motion and ordered petitioner to answer the complaint. We allowed petitioner's motions for leave to file a petition for writ of prohibition and to stay the FEPC proceedings. Respondents moved to dismiss, and their motions were taken with the case.

Cause No. 51947 involves a charge filed with the FEPC by Werner Herb on March 22, 1976, alleging that plaintiff, Royal Crown Bottling Company of Chicago,

discriminated against him because of a physical handicap. On October 4, 1978, more than two years after the expiration of the 180-day statutory period, the FEPC issued a complaint. Plaintiff's motion to dismiss the complaint was denied by the hearing officer. Plaintiff filed an action in the circuit court of Cook County seeking to enjoin the FEPC from proceeding. The circuit court denied preliminary injunctive relief. Plaintiff appealed to the appellate court, and we allowed its motion for direct appeal (58 Ill. 2d R. 302(b)). We also allowed the motion of Werner Herb that he be either added as an indispensable party or allowed to intervene as a party defendant.

We consider first the contention of defendant Herb that plaintiff's request for an injunction should be denied because it had failed to exhaust its administrative remedies and that it had an adequate remedy at law. He argues that the only administrative decision made in this matter is the interlocutory order of the hearing officer denying Royal Crown's motion to dismiss, that the order is not final, and that review of the Commission's final order can be had only under the provisions of the Administrative Review Act (Ill. Rev. Stat. 1977, ch. 48, par. 861). Citing a number of authorities (*Illinois Bell Telephone Co. v. Allphin* (1975), 60 Ill. 2d 350; *Bulk Terminals Co. v. Environmental Protection Agency* (1976), 65 Ill. 2d 31; *People ex rel. Naughton v. Swank* (1974), 58 Ill. 2d 95; *Chicago Welfare Rights Organization v. Weaver* (1973), 56 Ill. 2d 33), he argues that "to allow this case to proceed in the courts would be to allow Royal Crown to circumvent the statutory review procedures provided in the FEPA by the General Assembly."

The authorities cited are clearly distinguishable and apposite here is our holding in *Landfill, Inc. v. Pollution Control Board* (1978), 74 Ill. 2d 541. In that case the plaintiff brought an action seeking a declaratory judgment that a procedural rule of the Board was not authorized under the Environmental Protection Act. In deciding that the plaintiff was not required to exhuast its remedies, we said:

> "This court has held that where an administrative rule asserting administrative authority is challenged on its face as not authorized by the enabling legislation, exhaustion is not required. (*Bio-Medical Laboratories, Inc. v. Trainor* (1977), 68 Ill. 2d 540, 548.) Exhaustion is not required where a statute or rule under which an administrative body purports to act is challenged as unauthorized, since the judicial determination will affect the jurisdiction of the administrative body in all matters, not only in the instant

circumstances (see *Walker v. State Board of Elections* (1976), 65 Ill. 2d 543, 552).

The purposes for the exhaustion requirement are not served where an administrative assertion of authority to hear or determine certain matters is attacked on its face on the grounds that the assertion of jurisdiction is not authorized by statute. *** Where an agency's statutory authority to promulgate a rule and exercise jurisdiction is in issue, no questions of fact are involved. The agency's particular expertise is not implicated in statutory construction. Further, there is virtually no chance the aggrieved party will succeed before an agency where the issue is the agency's own assertion of authority. ***

We conclude that where an administrative body's assertion of jurisdiction is attacked on its face and in its entirety on the ground that it is not authorized by statute, exhaustion of administrative remedies and compliance with the Administrative Review Act is not required. Under these circumstances the judicial determination involves a question of law which will affect the jurisdiction of the administrative body in all cases and will hasten the administration of justice." 74 Ill. 2d 541, 550-51.

Citing *Springfield-Sangamon County Regional Plan Com. v. Fair Employment Practices Com.* (1978), 71 Ill. 2d 61, petitioner and plaintiff contend that, in issuing complaints more than 180 days after the filing of the charges, the FEPC had exceeded its statutory authority. It is the contention of the defendants that under our holding in *Springfield-Sangamon* the FEPC was authorized to issue the complaints, and in ruling on the motions to dismiss was empowered to make a case-by-case determination of the question whether the failure to file within the 180-day period was prejudicial to the employer.

Defendants' argument, in part, rests on the fact that in *Springfield-Sangamon* the court did not overrule *Moss-American, Inc. v. Illinois Fair Employment Practices Com.* (1974), 22 Ill. App. 3d 248, but held it to be inapposite. (71 Ill. 2d 61, 72.) The question presented in *Moss-American* was whether the 180-day period expired on November 2, 1968, or November 9, 1968. The hearing officer and the FEPC determined that the period expired on the latter date (22 Ill. App. 3d 248, 253) and the appellate court was not required to decide the question whether the FEPC exceeded its authority in issuing the complaint. Although the court in *Springfield-Sangamon* made reference to "waiver, estoppel and extension by the

parties" (71 Ill. 2d 61, 69), the record presented no such issues. A judicial opinion is authority only for what is actually decided (*Gannon v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co.* (1961), 22 Ill. 2d 305; *Village of Lombard v. Illinois Bell Telephone Co.* (1950), 405 Ill. 209), and the clear and unequivocal holding of *Springfield-Sangamon* is that "the 180-day period prescribed in the statute was intended to ensure expeditious action on behalf of the FEPC, and must be considered mandatory." 71 Ill. 2d 61, 68.

From our examination of the statute we conclude that the legislative intent was that the complaint be filed within 180 days of the charge and that absent an extension of the 180-day period agreed to in writing by all parties, and approved by a member of the FEPC, the filing of the complaint subsequent to the expiration of that time was unauthorized. We need not consider the question whether conduct other than an agreement in writing may be sufficient to extend the period, since the record presents no such question and, in each instance, the motions to dismiss filed with the FEPC show clearly that the limitation was not waived.

The parties have argued the question whether, under the circumstances presented, the issuance of a writ of prohibition is appropriate. The rule governing issuance of the writ of prohibition is stated in *People ex rel. Town Court v. Harrington* (1961), 21 Ill. 2d 224, 226, wherein the court said: "A writ of prohibition is an extraordinary judicial process whereby a superior court may prevent inferior tribunals or persons from exercising a jurisdiction with which they have not been vested by law." Its use is equally appropriate to prevent further proceedings when failure to act within the period fixed by statute renders void the actions of an administrative agency. See *Cummings v. Daley* (1974), 58 Ill. 2d 1; *Szkirpan v. Board of Education* (1975), 29 Ill. App. 3d 1047.

For the reasons stated it is ordered that in cause No. 51863 the writ of prohibition be issued, and that in cause No. 51947 the order of the circuit court of Cook County is reversed and the cause is remanded for further proceedings consistent with this opinion.

51863 - Writ awarded.
51947 - Reversed and remanded.

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

February 1, 1980

Mr. Randolph N. Stone
Attorney at Law
Mandel Legal Aid Clinic
6020 S. University Ave.
Chicago, IL 60637

Nos. 51863 - Board of Governors of State Colleges and Universities for Chicago State University, et al., petitioners, vs. Illinois Fair Employment Practices Commission, a State Agency; et al., etc., et al., respondents. Prohibition.
51947 Cons.

The Supreme Court today denied the petition for rehearing in the above entitled cause.

Very truly yours,

Clell L. Woods

Clerk of the Supreme Court

APPENDIX

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

Affidavit

James E. Braxton, being first duly sworn, on oath deposes and states as follows:

1. That he is Executive Director of the Illinois Fair Employment Practices Commission.

2. That in said capacity he is familiar with the various records, surveys and docket summaries concerning the caseload of charges filed with and disposed of by the Commission in recent years.

3. That those sources reveal that the Commission's caseload activity for the four most recent fiscal years has been approximately as portrayed in Table I below:

TABLE I

Caseload Data

	FY 74	FY 75	FY 76	FY 77	FY 78
Charges filed during year	1668	2301	2759	2120	———
Carried over from prior year	1624	1717	2233	3077	3481
Charges disposed of during year	1575	1785	1915	1716	———

4. That Commission records reveal the following approximate breakdown by age of charges which were pending for investigation by the Commission as of the dates indicated:

TABLE II

Charges Pending Longer Than 180 Days

	As of 7/1/76	As of 1/1/78
Number of Charges Pending More Than 180 Days	1453	2901
Total Charges Pending For Investigation	3077	3572

5. That the Commission's appropriation from the State's general revenue fund over the last four fiscal years has been as follows:

TABLE III

General Revenue Fund Appropriations to Commission

(Thousands of Dollars)

FY 74	FY 75	FY 76	FY 77
830.1	950.1	921.9	1114.1

6. That Commission records reveal the following approximate breakdown, by type of discrimination alleged, of charges filed with the Commission during the last four fiscal years.

TABLE IV

Charges Filed By Type

	FY 74 %	FY 75 %	FY 76 %	FY 77 %
Race, Color	812 (48.7)	987 (42.9)	1,352 (49.2)	877 (41.4)
Sex	466 (28.0)	1,049 (45.6)	755 (27.3)	476 (22.5)
Religion	20 (1.2)	21 (.9)	47 (1.7)	28 (1.3)
National Origin/ Ancestry	167 (10.0)	145 (6.3)	248 (.9)	232 (10.9)

TABLE IV cont.

Charges Filed By Type

	FY 74	%	FY 75	%	FY 76	%	FY 77	%
Retaliation	42	(2.5)	51	(2.2)	44	(1.6)	62	(2.9)
Arrest	7	(.4)	6	(.3)	19	(.7)	6	(.3)
Handicaps	0	(.0)	0	(.0)	91	(3.2)	211	(10.0)
Military Discharge	0	(.0)	0	(.0)	0	(.0)	2	(.1)
Multiple	154	(9.2)	42	(1.8)	203	(7.3)	226	(10.6)
	1,668		2,301		2,759		2,120	

Further affiant sayeth not.

Affiant

Subscribed and Sworn to before me

this 17th day of February, 1978

NOTARY PUBLIC

IN THE MATTER OF:

NAHUM ZACKAI,

Complainant,

AND

BOARD OF GOVERNORS,
CHICAGO STATE UNIVERSITY,

Respondent.

CHARGE NO. 1977 CN 0485

ORDER

1. Respondent has filed a motion to dismiss the above-captioned matter on two distinct grounds, the first being the Commission's failure to issue the complaint within 180 days of the filing of the underlying charge. The factual allegations are not at issue. Neither complainant nor the Commission denies that the charge was filed on November 30, 1976 or that the complaint issued on June 22, 1978. Simple arithmetic reveals that the complaint issued approximately 13 months after the expiration of the 180-day period prescribed for issuing complaints in §8.01(a) of the Fair Employment Practices Act.

Respondent, relying upon the recent decision of the Illinois Supreme Court in Springfield-Sangamon County Regional Plan Commission v. Fair Employment Practices Commission, 71 Ill. 2d 63, 373 N.E. 2d 1307 (1978), contends that the 180-day provision is mandatory and that failure to issue a complaint within that period is therefore fatal. Complainant argues that this matter may be easily distinguished from Springfield on its facts. Complainant further contends that the issues raised by respondent's motion ought to be decided in accordance with the holding in Moss-American, Inc. v. FEPC, 22 Ill. App. 3d 248, 317 N.E. 2d 343 (5th Dist. 1974). Complainant also relies upon a variety of policy arguments. Staff counsel for the Commission has elected not to submit argument.

The Commission addressed the 180-day issue for the first time since the Springfield decision only recently. [1/] Its decision to adopt an order denying a motion to dismiss in Cooper and Weiboldt Stores et al., FEPC Charge Nos. 1976 CN 0156 and 1976 CN 0157, controls the issues raised by respondent's motion. The order in Cooper found that the 180-day provision is not mandatory, as delay in issuing the complaint was only one factor in creating the prejudice to respondent that warranted dismissal in Springfield. Judge Humphrey determined that a 19 month delay in issuing the complaint was not grounds for dismissal because the employer in Cooper, unlike the Regional Plan Commission, had been a party since the inception of the proceedings. Cooper also rejected the respondent's contention that the increased liability caused by a delayed complaint is prejudicial to the extent that it requires dismissal of the claim.

The present matter is far more similar on its facts to Cooper than to Springfield. The procedural irregularities that compounded the delay in issuing the complaint in the Supreme Court decision are not present here. The delay is shorter than in either case.

Amendments enacted after Cooper further support Judge Humphrey's determination that respondent suffers no special harm if the Commission issues an untimely complaint. P.A. 80-1455 preserves complainant's claim regardless of the timeliness of the complaint. Consequently, respondent remains subject to suit on the issues raised therein well beyond the 180-day period.

2. Respondent further contends that complainant must prosecute his complaint in the Court of Claims. Relying primarily upon Kane v. Board of Governors of State Colleges and Universities, 43 Ill. App. 3d 315, 356 N.E. 2d 1340 (4th Dist. 1976), respondent asserts that §8 of the Court of Claims Act, Ill. Rev. Stat. ch. 37 §439.8 (1977), bars the

1/ Although the decision in Springfield came down on January 20, 1978, the Commission was unable to take a position in response thereto for nearly one year. After denying a petition for rehearing on March 30, 19 the Court stayed the mandate until July 10, 1978. On August 31, Chief Administrative Law Judge Humphrey entered the first order dealing with the issues raised in Springfield and certified it to the Commission for an interlocutory decision. Judge Humphrey's decision in Cooper and Weiboldts Stores, Inc. et al., FEPC Charge Nos. 1976 CN 0156 and 1976 CN 0157, was argued on December 13, 1978 and formally adopted on January 10, 1979.

Commission from hearing this matter because it is a claim against the state, founded upon a state law. There is no doubt that Kane found the Board of Governors to be an "arm" of the state. There is substantial question, however, as to whether such a determination leads to the conclusion that all claims against that body automatically fall within the exclusive jurisdiction of the Court of Claims.

The provisions of the FEPA and the Court of Claims Act ("CCA") appear to conflict on this point. §8 (a) of the latter provides the Court with exclusive jurisdiction to hear and determine:. ."(a) All claims against the state founded upon any law of the State of Illinois. .." At the same time, however, §6.07 of the FEPA empowers the Commission "[t]o issue, receive, investigate, and determine charges filed with it in conformity with this Act." Further, §2(d)(ii) of the Act specifically enumerates the State as an employer subject to the authority of the Commission. Thus, the issue raised by respondent's motion is not whether the Board of Governors is an arm of the state, but rather whether addition of the word exclusive to §8 of the CCA was intended to supersede the Commission's authority to determine claims against the state.

Kane is of little assistance on this point because the jurisdiction dispute in that case involved the Workman's Compensation Act, which is expressly excepted from the provisions of the CCA. Case authority cited by respondent that construes those subparagraphs other than (a) of §8 is equally irrelevant; those cases did not involve statutory provisions and consequently can shed little light upon resolving conflicts arising between the CCA and other statutes.

As there are no cases deciding the status of Commission proceedings under the CCA, I must apply general criteria to determine the proper forum for complainant's claim. The Illinois Supreme Court set forth one standard for making such a determination in Chicago Welfare Rights Organization v. Weaver, 56 Ill. 2d 41, 305 N.E. 2d 140 (1973), appeal denied, cert. denied, 417, U.S. 962 (1974). In Weaver recipients of public assistance benefits were seeking money judgments for benefits allegedly denied them for improper reasons. The Court rejected the

holding of the Appellate Court that the plaintiffs were required to bring suit in the Court of Claims to provide for orderly disbursement of the state funds. The Court explained:

> In our opinion, the fact that the General Assembly had made available an administrative remedy, followed by judicial review, negatives the conclusion of the Appellate Court that the plaintiff's only remedy was by a proceeding in the Court of Claims. 56 Ill. 2d 33, 40.

The arguments opposing the exclusive jurisdiction of the Court of Claims are, in my view, far stronger in the present matter. Not only does §10 of the Act provide for the judicial review viewed as critical in Weaver, but the legislature has specifically named the state as an employer subject to the authority of the Commission. As a consequence, I must conclude that complainant is not required to pursue his claim in the Court of Claims.

In view of the foregoing it is hereby ordered that:

1. Respondent's motion to dismiss is denied.

2. Respondent shall file an answer within 15 days of the service of this order, pursuant to §10.5 of the Rules and Regulations of the Commission.

3. The public hearing shall commence on May 9-11, 1979, as per the attached Amended Notice of Public Hearing.

4. The pre-hearing memorandum shall be filed on or before April 30, 1979.

5. Because of the prolonged delay already imposed upon this matter no continuances will be granted to prepare for hearing.

FAIR EMPLOYMENT PRACTICES COMMISSION

BY: Patricia A. Patton
PATRICIA A. PATTON
Administrative Law Judge
Administrative Law Division

ENTERED THIS 31ST DAY OF JANUARY 1979

IN THE MATTER OF:

NAHUM ZACKAI,

COMPLAINANT,

AND

BOARD OF GOVERNORS,
CHICAGO STATE UNIVERSITY,

RESPONDENT.

CHARGE NO. 1977 CN 0485

O R D E R

1. On February 16, 1979 respondent moved for reconsideration of my order denying its motion to dismiss. At that time I was advised for the first time that a suit is presently pending in the Court of Claims relating to the same issues before the Commission in this matter. As the public hearing was not scheduled to commence for some time, I allowed respondent the opportunity to submit authority in support of the proposition that the action pending in the Court of Claims barred complainant from proceeding before the Commission. Respondent's Points and Authorities of March 9, 1979 did not address that issue other than to state that complainant, by filing in the Court of Claims, "has recognized that the Illinois Court of Claims has jurisdiction with respect to his claim and is estopped from arguing that said jurisdiction is not exclusively in the Court of Claims." As respondent presents no authority in support of its position, I have no reason to see its "Points" as anything but bootstrapping 1/ and repetition of the issues presented in the motion to dismiss.

2. Complainant has filed a Motion to Compel Answer to Complaint, wherein he cites my order of January 31, 1979 requiring respondent to file an answer within fifteen days of the date of service. Respondent apparently filed its Motion for Reconsideration in lieu thereof.

1/ Respondent also argues that it is within my power to dismiss the complaint whether or not dismissal is mandatory by the Court of Claims Act. Respondent fails to specify, however, on what grounds I should choose to exercise this authority, assuming it exists. Further, I can find no 4.6B in the Rules and Regulations of the Commission, as amended August, 1978.

Rather than consume time and energy debating the propriety of respondent's course of action, we would do better to proceed to the merit without further delay by establishing a new schedule.[2/]

In view of the foregoing, it is hereby ordered that:

1. Respondent's motion for reconsideration is denied;
2. Complainant's motion to compel answer to complaint is denied;
3. Respondent shall file an answer to the complaint in this matter on or before March 30, 1979;
4. In light of the frivolous delay imposed by respondent's motion for reconsideration, complainant is given leave to undertake discovery procedures prior to the filing of respondent's answer.

FAIR EMPLOYMENT PRACTICES COMMISSION

BY: Patricia A. Patton
PATRICIA A. PATTON
Administrative Law Judge
Administrative Law Division

ENTERED: MARCH 13, 1979.

2/ In order to expedite matters, I have not waited 5 days as provided by Section 11.8 of the Rules and Regulations of the Commission. Time has already been consumed needlessly, and the deficiencies of respondent's position are apparent on the face of its Points and Authorities.

Ill. Rev. Stat. ch. 48, §§851 et seq. (1975):

FAIR EMPLOYMENT PRACTICES ACT

Title as amended by P.A. 79-186, §2.

***

851. §1. Declaration of policy.) Whereas denial of equal emloyment opportunity because of race, color, religion, sex, national origin, ancestry or unfavorable discharge from military service, or physical or mental handicap unrelated to ability with consequent failure to utilize the productive capacities of individuals to the fullest extent deprives a portion of the population of the State of earnings necessary to maintain a reasonable standard of living, thereby tending to cause resort to public charity and may cause conflicts and controversies resulting in grave injury to the public safety, health and welfare:

Therefore, it is declared to be the public policy of this State that without in any way precluding any employer from selecting between persons of equal merit, ability, and capabilities, equal employment opportunity or apprenticeship opportunity without discrimination because of race, color, religion, sex, national origin, ancestry or unfavorable discharge from military service or physical or mental handicap unrelated to ability should be protected by State law.

It is also the public policy of this State to protect employers, labor organizations and employment agencies from unfounded charges of discrimination.
Amended by P.A. 79-186, §1, eff. Oct. 1, 1975; P.A. 79-370, §1, eff. Oct. 1, 1975.

852. §2. Definitions.) When used in this Act, unless the context otherwise requires, the term:

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(d) "Employer" includes and means: (i) any person (as defined in this Section) employing 50 or more persons within the State within each of 20 or more calendar weeks within the current or preceding calendar year prior to July 1, 1968, beginning July 1, 1968, any person employing 25 or more persons during 20 or more calendar weeks within any calendar year, and beginning January 1, 1976, any person employing 15 or more persons during 20 or more calendar weeks within any calendar year; (ii) the State and any political subdivision, municipal corporation or other governmental unit or agency thereof, without regard to the number of emloyees. The term "employer" does not include any religious corporation, association, educational institution or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its activities.

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853. §3. Unfair employment practices.) It is an unfair employment practice:

(a) For any employer, because of the race, color, religion, sex, national origin, ancestry or physical or mental handicap unrelated to ability of an individual, or an unfavorable discharge from military service, to refuse to hire, to segregate, or otherwise to discriminate against such individual with respect to hire, selection and training for apprenticeship in any trade or craft, tenure, terms or conditions of employment.

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856. §6. Powers and duties of the Commission.) In addition to other powers and duties prescribed in this Act, the Commission shall have the powers and duties enumerated in Sections 6.01 through 6.08. As amended by act approved Aug. 11, 1967, L.1967, p. 2853.

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856.07 Charges--Receiving and investigation.] §6.07. To issue, receive, investigate and determine charges filed with it in conformity with this Act. Amended by P.A. 79-548, §1, eff. Oct. 1, 1975.

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858. §8. Procedure--Charge, investigation, conference, settlement and adjustment.) Whenever within 180 days after the date that an unfair employment practice allegedly has been committed, a charge in writing under oath or affirmation is filed with the Commission by a complainant or by the Commission upon a vote of at least 3 members and in such detail as to substantially apprise any party properly concerned as to the time, place and facts with respect to such alleged unfair employment practice, that any employer, labor organization, employment agency, or person, hereinafter referred to as a respondent, has committed such unfair employment practice, the Commission shall promptly serve a copy of the charge within 10 days on the respondent and thereafter shall institute an investigation by its employees to ascertain the facts relating to such alleged unfair employment practice. If it is determined by the Commission, after such investigation, that there is not substantial evidence that the alleged unfair employment practice has been committed, the charge shall be dismissed; otherwise the Commission, a Commissioner or a hearing officer, who shall be an attorney licensed to practice in Illinois, designated by the Commission, shall endeavor to eliminate the effect thereof and prevent repetition thereof by means of conference and conciliation. The complainant and respondent shall be notified of the time and place of the conference by registered or certified mail at least 10 days prior thereto and either or both parties shall appear at such conference or conciliation in person or by

attorney. The place fixed shall be within 35 miles of the place where the unfair practice is alleged to have been committed. What occurs in the conference or conciliation meeting shall not be disclosed by the Commission unless the complainant and respondent agree in writing that such disclosure be made. When a settlement is effectuated in conference and conciliation conducted by a Commissioner or hearing officer,the terms of settlement and adjustment shall be subject to the approval of the Commission. The Commission shall notify the complainant and the respondent of the disposition of every charge filed and the terms of any settlement, adjustment or dismissal thereof. Any memeber of the Commission who takes part in an investigation shall thereby be disqualified to hear any evidence on the cause in question. Except as provided in this Section, the manner and form of filing charges shall be in accordance with such rules and regulations as the Commission shall from time to time prescribe. If a settlement is effectuatd, and the terms thereof are approved by the Commission, then the Commission shall prepare written terms of settlement and adjustment and have the complainant and respondent agree to them in writing. The Commission shall then enter upon all parties an order in accord with the executed written terms of settlement and adjustment. If the Commission determines after an investigation that there is substantial evidence that the respondent has violated the terms of settlement and adjustment and the order entered pursuant thereto, the Commission may either commence an action pursuant to Section 11 of this Act, or issue a written complaint and order a public hearing on such alleged violation, and, finding that such alleged violation has occurred, may then order such remedies as may be necessary to correct the violation. If the Commission finds that no violation has occurred it shall dismiss the complaint. If terms of settlement and adjustment not approved by the Commission are entered into by a complainant and respondent, the Commission need not enter an order in accord therewith and may terminate further proceedings in the case. The Commission may dismiss a charge if, in conference and conciliation, it is established to the satisfaction of the Commission that the respondent has taken steps to eliminate the effects of the unfair employment practice charged and prevent the repetition thereof, or if, in conference and conciliation, the respondent offers and the complainant declines to accept terms of settlement and adjustment which the Commission finds are sufficient to eliminate the effects of the unfair employment practice charged and prevent the repetition thereof.
Amended by P.A. 79-548, §1, eff. Oct. 1, 1975.

858.01 §8.01. Procedure--Complaint, answer, hearing and order.) (a) In case of failure to settle or adjust any such charge by conference and conciliation in accordance with Section 8 of this Act, the Commission shall cause to be issued and served upon such respondent a written complaint, under oath or affirmation, stating the charge of unfair employment practice substantially as

alleged in the charge theretofore filed with the Commission as hereinbefore provided in Section 8 of this Act and the relief sought on behalf of the person aggrieved and containing a notice of public hearing before a commissioner or a duly appointed hearing examiner at a place therein fixed, to be held not less than 30 nor more than 90 days after the service of such complaint. The place fixed shall be within 100 miles of the place where the unfair employment practice is alleged to have been committed.

Whenever such a charge of an unfair employment practice has been properly filed, the Commission, within 180 days thereof or within any extension of that 180 day period agreed to in writing by all parties and approved by a member of the Commission, shall either issue and serve a complaint in the manner and form set forth in this Section or shall order that no complaint be issued. Any such order shall be duly served upon both the complainant and the respondent.

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858.01a. Actions -- Injunctions -- Limitations] §8.01a. In the case of any charge of an unfair employment practice which has been properly filed with the Commission prior to March 30, 1978, which has not been settled or adjusted by conference and conciliation under Section 8, and which within 180 days thereafter has not been the subject of a complaint issued by the Commission or an order that no complaint be issued, the person filing the charge may seek appropriate injunctive or other relief by filing an action in the circuit court of the county where the alleged unfair employment practice occurred, and if the person prevails in such action the court may award such person costs and reasonable attorneys' fees. The Commission shall notify all such persons by registered mail of their right to seek such relief and any such action must be initiated in the circuit court within 2 years of the receipt of such notice, notwithstanding any other statute of limitations imposed on such actions.
Added by P.A. 80-1455, §1, eff. Sept. 16, 1978.

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860. §10. Review under Administrative Review Act.) Any complainant or respondent may apply for and obtain judicial review of an order of the Commission entered under this Act in accordance with the provisions of the "Administrative Review Act," approved May 8, 1945, as heretofore or hereafter amended; and the Commission in proceedings under this Section may obtain an order of Court for the enforcement of its order.